No. 77-2

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM C. WAGGONER, ET AL., PETITIONERS

v.

GRIFFITH COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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1. Petitioner Union has labor agreements with a large number of employers engaged in the construction industry in southern California. The agreements, which cover multiple bargaining units, obligate the employers, who are general contractors and subcontractors, to make specified contributions to four employee fringe benefit funds created pursuant to 29 U.S.C. 186(c)(5) and administered by petitioner trustees.[1] The agreements also provide that no contractor shall subcontract any part of a job to a subcontractor who is delinquent in his payments to the trust funds; if a contractor does engage a

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[1]These trusts collect approximately $5 million per month from over 2,500 employers for the benefit of 40,000 employees (Pet. App. 2a).

delinquent subcontractor, he is liable to the trustees for all accrued delinquencies of the subcontractor and is subject to a strike by the Union (Pet. App. 1a-3a).[2] The question presented is whether the subcontracting clause furthers a legitimate, primary objective, or has a secondary objective proscribed by Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act, 61 Stat. 141, as amended, 29 U.S.C. 158(b)(4)(B) and 158(e).

Upon charges filed by respondents—three general contractors against whom the subcontracting clause was sought to be invoked because they had subcontracted work to a delinquent subcontractor—the General Counsel of the Board issued a complaint against the Union alleging that the clause violated Section 8(e) and that attempts to enforce it through strike threats violated Section 8(b)(4)(B) of the Act. A divided Board dismissed the complaint. In the view of the Board majority, the subcontracting clause furthered a legitimate, primary objective: it was designed to protect against dilution of the fringe benefits of the employees of all of the employers who were signatory to the agreements with the Union (Pet. App. 22a-28a).[3]

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[2]Each trust pools the contributions from all employers into one account. An employee's eligibility for benefits is generally dependent on hours worked, but has nothing to do with whether his employer actually made contributions to the trusts. Thus, if an employer fails to make the required contributions, all beneficiaries suffer reduced benefit levels but no employees are completely cut off from benefits (Pet. App. 2a).

[3]The Board stated (Pet. App. 26a-27a):

> We need not and do not pass on the validity of restrictive agreements in industries other than the construction industry or in circumstances different from those in this case. Here at least it is clear that a substantial number of the Union's members work from job to job and from contractor to contractor with

2. The court of appeals reversed the Board's dismissal of the complaint and remanded the case for further proceedings consistent with its opinion (Pet. App. 1a-21a). In the court's view (*id.* at 15a), "the critical question is not whether the agreement was substantially for the benefit of the employees of all contracting employers * * * but whether the agreement was substantially for the benefit of the employees in [respondent's] employees' work unit as opposed to the members of the Union generally." The court answered this question in the negative. "Employees of many work units are beneficiaries of the trust funds and the burdens of delinquencies in trust fund contributions are shared equally by all. By withholding services from contractors doing business with delinquent subcontractors with the object of eliminating those delinquencies, the Union seeks to benefit not only the contractors' work units, but all its members who may become eligible to receive funds from the trust" (*ibid.*) Accordingly, the court concluded (*id.* at 16a) that "the agreements and their enforcement constitute unlawful secondary activity."

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no certainty that they will remain employed in any particular unit for any period of time. Without a trust fund arrangement encompassing the interests of employees of all employers involved, no unit of employees can be assured that funds will be available for medical emergencies or for retirement.* * * This agreement and its maintenance is addressed solely to the labor relations of the contracting employees vis-a-vis their own employees. As such, it satisfies the touch-stone of legality set forth by the Supreme Court in *National Woodwork* [*Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612, 645]. * * * [T]he way is not open to disregard the delinquency of one subcontractor without disregarding the delinquencies of all others. Totaled together, the impact of many delinquent subcontractors doing business with impunity in this industry would be destructive of the entire trust fund plan. * * *

3. The Board believes that the court of appeals erred in concluding that the subcontracting clause and its enforcement constituted unlawful secondary activity. The Board has not filed a petition for a writ of certiorari, however, because it considers that its own decision turned largely on the circumstances of this particular case (see n. 3, *supra*). Cf. *Walsh* v. *Schlecht*, 429 U.S. 401. Should the petition filed by the trustees and the Union be granted, however, the Board intends to file a brief defending its order dismissing the complaint.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1977.